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No. 78-1139

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NORTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 587 F. 2d 625. The order of the district court (App. A, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1978. A timely petition for rehearing was denied on October 20, 1978 (Pet. App. A-45). The petition for a writ of certiorari was filed on January 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Reorganization Plan No. 1 of 1978, which clarified the authority of the Attorney General to file a "pattern or practice" employment discrimination action

against state and local governments without referral from the Equal Employment Opportunity Commission, was properly applied to a suit filed prior to the effective date of the plan.

STATEMENT

1. On October 5, 1973, the United States advised the North Carolina Attorney General that the Department of Justice had initiated an investigation of the employment practices of the North Carolina State Highway Patrol. The purpose of the investigation was to determine whether the State Highway Patrol was engaged in violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Eighteen months later, the Department notified the State Attorney General that the United States had concluded that the State was engaged in a pattern or practice of discriminating against blacks and women in the employment of State Highway Patrol personnel. Discussions between the United States and the State of North Carolina ensued. After it became clear that there was no possibility of settlement without contested litigation, the instant suit was filed on October 23, 1975, in the United States District Court for the Eastern District of North Carolina.

The magistrate to whom the matter was referred recommended that the complaint be dismissed. The magistrate concluded (App. B, *infra*) that under Section 707(c) of the Civil Rights Act, the Attorney General had no authority to bring "pattern or practice" suits after March 24, 1974. Although prior to 1972, Section 707 had accorded the Attorney General independent authority to bring pattern or practice suits, the magistrate relied on two previous district court decisions[1] in concluding that the 1972 amendments to Title VII divested the Attorney General of power to bring pattern

[1]The cases the magistrate relied on are *United States* v. *Pima County Community College District*, 409 F. Supp. 1061 (D. Ariz. 1976), and *United States* v. *Fresno Unified School District*, 412 F. Supp. 392 (E.D. Cal. 1976). The Ninth Circuit has reversed the judgment in the *Fresno* case (*United States* v. *Fresno Unified School District*, No. 76-2539 (Mar. 12, 1979)), and dismissed the appeal in the *Pima County* case (*United States* v. *Pima County Community College District*, No. 76-1965 (Mar. 12, 1979)) on procedural grounds.

or practice suits against both private and public employers. The district court adopted the recommendation of the magistrate and dismissed the action (App. A, *infra*). The court held that the Attorney General has no authority to bring pattern or practice suits except upon referral from the Equal Employment Opportunity Commission.[2]

2. While the appeal was pending in the Fourth Circuit, the President submitted to Congress, pursuant to 5 U.S.C. 903, a "Plan to Consolidate Federal Equal Employment Opportunity Activities," also known as Reorganization Plan No. 1 of 1978 (Pet. App. A-5 to A-19). Section 5 of the Plan (Pet. App. A-17 to A-18) transfers from the Equal Employment Opportunity Commission to the Attorney General all functions "concerning initiation of [pattern or practice] litigation with respect to State or local government or political subdivisions * * * and all necessary functions related thereto, including investigations, findings, notice and an opportunity to resolve the matter without contested litigation * * * to be exercised by him in accordance with procedures consistent with said title VII." The Plan became effective on May 5, 1978.[3]

[2]It is undisputed that the Commission took no part in investigation or the prosecution of this suit.

[3]Resolutions disfavoring the Plan were introduced in both houses of Congress, but committees of both houses reported favorably on the Reorganization Plan. See S. Rep. No. 95-750, 95th Cong., 2d Sess. (1978); H.R. Rep. No. 95-1069, 95th Cong., 2d Sess. (1978). The House resolution reached a vote in the House and was defeated by a vote of 356-39. See 124 Cong. Rec.

Exec. Order No. 12068, issued on June 30, 1978 (Pet. App. 44), set July 1, 1978, as the date upon which the Commission's authority with respect to governmental suits against public employers would formally be transferred to the Attorney General.

3. The court of appeals reversed (Pet. App. A-1 to A-3). It held that Section 5 of the Reorganization Plan vests the Attorney General with independent authority to bring pattern or practice suits against public employers, and it held that applying the law "as it is now written" (Pet. App. A-3), the dismissal order must be reversed.[4]

ARGUMENT

The court of appeals properly applied the law in effect at the time of decision in allowing the suit to proceed to the merits. While there is a conflict between the circuits as to retroactive application of the Reorganization Plan, review by this Court is not warranted because that issue is of no continuing importance.

1. Title VII, as amended, plainly accords the Attorney General authority to sue public employers upon referral by the Commission, and the Act concomitantly denies the Commission the authority to initiate suits against state or local governments. See *United States* v. *South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977) (three-judge court), aff'd mem., 434 U.S. 1026 (1978); *United States* v. *Garfield*

H3206 (daily ed. Apr. 25, 1978). In the Senate, the resolution did not reach a vote and so the plan became effective 60 calendar days after its submission.

[4]The court did not address the government's contention that the Attorney General had retained pattern or practice authority with respect to public employers independent of the Reorganization Plan.

Heights City School District, 581 F. 2d 791 (6th Cir. 1978). The Commission is required to investigate all allegations of employment discrimination, whether by public or private employers. 42 U.S.C. 2000e5(b) and 2000e-6(e). The Commission is also required to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" (42 U.S.C. 2000e-5(b)). If it is unable to obtain an acceptable conciliation agreement with a respondent who is a private employer, the Commission may bring a civil action against the respondent (42 U.S.C. 2000e-5(f)). If the respondent is a public employer, however, the Commission may not sue, but "shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court" (*ibid.*). This scheme assures that Title VII suits, whether against public or private employers, are preceded by notice to the respondent under investigation and an opportunity to avoid contested litigation by voluntary compliance.

Under the Reorganization Act, 5 U.S.C. 903(a)(1), the President is authorized to "transfer * * * the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency." Section 5 of Reorganization Plan No. 1 (Pet. App. A-17 to A-18) transferred all pre-litigation functions applicable to pattern or practice suits against public employers to the Attorney General, giving him both these functions and responsibility for the litigation itself. The transfer effected by the Reorganization Plan does not extinguish any procedural rights previously enjoyed by public employers. On the contrary, the transfer explicitly preserves them.

Neither court below considered whether the pre-suit course of dealing between the parties satisfied the

procedural requirements contemplated by the Reorganization Plan.[5] The sole question decided below was whether the Attorney General has authority to bring the suit at all. All other questions, including whether the preconditions to suit were met, are reserved for determination on remand. Petitioners thus have not been prejudiced by the application to this case of the law as it stood at the time of the appellate court's ruling. See *United States* v. *Fresno Unified School District*, No. 76-2539 (9th Cir. Mar. 12, 1979), slip op. 8-11, 13-14.

By looking to the law in effect at the time of its decision, the court of appeals correctly applied the doctrines of *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), and *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). In *Bradley*, this Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. That principle was applied in *United States* v. *Alabama*, 362 U.S. 602 (1960), a case closely analogous to this one, where the Court held that the government could bring suit against the State of Alabama, even though the suit was commenced prior to the enactment of the 1960 civil rights statute that authorized naming the State as a defendant.

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[5]As we have noted, there were extensive pre-suit negotiations between the State and the Department of Justice designed to reach a satisfactory accommodation without the need for contested litigation. Discussions concerning entry of a consent decree were carried on both before and after suit was filed. Consent decrees have been recognized as an acceptable means of effectuating Title VII's preference for voluntary settlement. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 848 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

2. The decisions of other courts that have treated this question do not provide any reason for the Court to grant review here. In *United States* v. *South Carolina, supra*, the three-judge district court held that the Attorney General could not bring suit against a public employer without prior EEOC processing and referral. Because that case was decided before the Reorganization Act, it is consistent with the decisions in the instant case and in *United States* v. *Fresno Unified School District*, No. 76-2539 (9th Cir. Mar. 12, 1979). To be sure, in *United States* v. *Garfield Heights City School District*, 581 F. 2d 791 (6th Cir. 1978), the court of appeals declined to give the Reorganization Plan retroactive effect in cases pending on appeal.[6] The government did not seek a writ of certiorari in that case, however, because the option of refiling, in light of the Reorganization Plan, remains open. Because the Reorganization Plan makes it clear that the Attorney General can bring pattern or practice suits without referral from the Commission, the disagreement between the Sixth Circuit on the one hand and the Fourth and Ninth on the other is of no prospective significance and thus does not warrant plenary review by this Court.

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[6]The *Garfield Heights* court mistakenly believed the case to be controlled by this Court's summary affirmance in *United States* v. *South Carolina, supra*. The three-judge court in *South Carolina* had disposed of numerous issues raised by the government and the intervening private parties. Most significantly, the district court had reached the merits of the private plaintiffs' claim, holding that the State had not engaged in unlawful discrimination by using the National Teachers' Examination to certify teachers. Summary affirmance, therefore, necessarily disposed of the case on its merits. The district court's holding with respect to the Attorney General's authority to sue was unnecessary to the ultimate disposition of the appeal. See *United States* v. *Fresno Unified School District, supra*, slip op. 12-13 & n.4, citing, *inter alia*, *Mandel* v. *Bradley*, 432 U.S. 173 (1977).

3. In any event, by consolidating public sector pattern or practice authority in the Attorney General, the Reorganization Plan merely reaffirmed the intent of Congress in passing the 1972 amendments.[7] See *United States* v. *Fresno Unified School District, supra,* slip op. 8. The judgment of the court of appeals can therefore be sustained on this independent ground as well, even though the court did not reach this issue.

Title VII initially exempted states and political subdivisions from coverage. The Act gave the Commission no enforcement power; it was permitted only to process charges of unlawful employment discrimination and to attempt to achieve compliance by means of negotiation and conciliation. These procedures, mandated by Section 706, were (and remain) preconditions to private suit. The Attorney General, however, was authorized by Section 707 of the Act to bring suit, without preconditions, whenever he had "reasonable cause to believe that any person or group of persons [covered by the Act had] engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title * * *." Unlike Section 706, Section 707 was designed "to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 843 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

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[7]In his message submitting the Plan to Congress, the President characterized Section 5 as a measure designed to "[c]larify the Attorney General's authority to initiate 'pattern or practice' suits under Title VII in the public sector" (Pet. App. A-10). See also Pet. App. A-13 ("This proposal reinforces * * * and clarifies the Attorney General's authority * * *.").

Congress had two major concerns in 1972 when it amended Title VII: to strengthen the Commission by giving it enforcement as well as conciliation powers; and to extend coverage of the Act to public employers. In enacting the amendments, however, Congress created the ambiguity now present in Sections 706 and 707. While Congress granted the Commission power to sue private employers, it expressly denied it equivalent authority to sue state and local governments. 42 U.S.C. 2000e-5(f)(1). In Section 707(c), on the other hand, the Act purported to transfer from the Attorney General to the Commission the authority to bring pattern or practice suits. 42 U.S.C. 2000e-6. Taken literally, the "transfer" would appear to include the power to bring pattern or practice suits against public employers—a power Congress manifestly did not want to give the Commission.[8]

The only sensible interpretation that is consistent with the purposes of the 1972 amendments is that Congress intended to transfer to the Commission only

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[8]See, *e.g.*, S. Rep. No. 92-415, 92d Cong., 1st Sess. 25 (1971) (explaining why the Senate version of the bill requires Attorney General suits against public employers rather than EEOC cease-and-desist proceedings). See also 118 Cong. Rec. 296 (1972) (remarks of Sen. Williams): "During discussion in the committee, several members expressed concern that States and political subdivisions would be subjected to administrative hearings and orders of EEOC. This enforcement scheme was devised to provide the necessary power to achieve results without the needless friction that might be created by a Federal executive agency issuing orders to sovereign States and their localities." Although floor amendment resulted in the Senate's abandoning cease-and-desist authority in favor of court enforcement, the division of Section 706 power between the Commission and the Attorney General remained.

Despite the clear congressional intent to deny the Commission authority to sue public employers, one district court in the Fifth Circuit has held that this power was transferred to the Commission. *United States* v. *Pompano Beach*, No. 76-6059 (S.D. Fla. July 8, 1976).

that power exercised by the Attorney General prior to 1972, *i.e.*, the power to bring pattern or practice suits against entities other than states and local governments. This was the understanding of the bill reported by Representatives Erlenborn and Dent after the Conference Committee had settled upon the final version in March 1972.[9] It was also the interpretation placed upon Section 707 (as amended) by the Senate Committee that considered the Reorganization proposal in 1978 (S. Rep. No. 95-750, 95th Cong., 2d Sess. 4 (1978) (emphasis added)):

> The 1972 amendments to the Civil Rights Act of 1964 amended the existing provision in the 1964 law regarding the Attorney General's authority to bring suits charging a "pattern or practice" of discrimination. That authority, which had been vested exclusively with the Attorney General, was to be shared with the EEOC for 2 years and thereafter transferred (effective March 24, 1974) to the EEOC *except where the defendant is a State or Local Government*. The Department of Justice was to retain jurisdiction to institute pattern or practice suits under title VII against State and Local Government employers subject to the Civil Rights Act.

Both the Senate and House Committees that dealt with Reorganization saw Section 5 of the Plan as a means of restoring certainty to the Attorney General's

[9]See 118 Cong. Rec. 7567, 7568 (1972) (remarks of Rep. Erlenborn); *id.* at 7569 (remarks of Rep. Dent): "The conference bill * * * would, 2 years after enactment, transfer the Justice Department's 'pattern or practice' jurisdiction to the EEOC. * * * The jurisdiction to sue State or local governments would, however, remain solely with the Justice Department so that no overlap would occur in this area."

independent pattern or practice authority with respect to public employers. See S. Rep. No. 95-750, *supra*, at 2; H.R. Rep. No. 95-1069, 95th Cong., 2d Sess. 8 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

DOJ-1979-04

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN District of NORTH CAROLINA
RALEIGH DIVISION

No. 75-0328-CIV-5

UNITED STATES OF AMERICA, Plaintiff

vs.

STATE OF NORTH CAROLINA; E. W. JONES, Commander, North Carolina State Highway Patrol; JAKE ALEXANDER, Secretary, North Carolina Department of Transportation and Highway Safety, Defendants

ORDER

This is an action instituted by the Attorney General of the United States on October 23, 1975 against the North Carolina State Highway Patrol upon allegation that the above-captioned defendants were engaging in practices which discriminate against blacks and women in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The defendants filed a motion for judgment on the pleadings which was referred to the United States Magistrate for review and recommendation.

The Memorandum and Recommendation of the United States Magistrate was filed with the court, copies were sent to counsel and written exceptions and replies to the proposed findings and recommendation were filed in apt time. 28 U.S.C. § 636(b) as amended by 90 Stat. 2729, Pub. L. 94-577 (Oct. 21, 1976). The court has made an independent examination of the complaint, the motion, the supporting briefs and responses thereto and concludes that the defendants' motion for judgment on the pleadings should be granted for the reasons set forth in the Magistrate's Memorandum, which is attached hereto and made a part of this order.

Although exceptions were filed to the Magistrate's Recommendation, there is no dispute as to the relevant facts. The dispute concerns the legal conclusion reached, i.e., whether, as of October 23, 1975, jurisdiction to bring pattern and practice suits was lodged with the Attorney General or with the Equal Employment Opportunity Commission (EEOC). Plaintiff admits that 42 U.S.C. § 2000e-6 no longer grants jurisdiction to the Attorney General to bring pattern or practice suits against private employers; however, it argues that a different rule applies in actions against governmental employers. Specifically, plaintiff asserts that in 1975 the Attorney General was authorized to bring a pattern or practice suit against a governmental employer under 42 U.S.C. § 2000e-6 and that it could do so without the referral from the EEOC provided for in 42 U.S.C. § 2000e-5(f)(1).

The argument made by the Attorney General has been rejected in *United States v. Pima County Community College District*, 409 F. Supp. 1061 (D.C. Arizona 1976), and *United States v. Fresno Unified School District*, 412 F. Supp. 392 (E.D. Cal. 1976), both of which are cited in the Magistrate's Memorandum. Both cases analyze the legislative history and congressional intent of the 1972 amendments as well as the statutory scheme for pattern or practice suits under 42 U.S.C. § 2000e-5 and 2000e-6 and will not be repeated in this order.

The court finds the 1972 amendments to 42 U.S.C. § 2000e-6(c), (d) and (e) to be unambiguous and in accordance with congressional policy of pursuing a unified program in attacking employment discrimination. Employees look to only one agency for relief. Employees, whether public or private, are free from multiple investigations of employment policies by different agencies. The government is saved duplication of effort

and expense as well as the unnecessary waste of legal and investigative talent. In short, as of October 23, 1975, the Attorney General had no jurisdiction to bring a Title VII pattern or practice suit on his own initiative and in the absence of a referral from the EEOC.

For the foregoing reasons, it is now

ORDERED that the defendants' motion for judgment on the pleadings is granted and the action is dismissed.

/s/ F. T. Dupree, Jr.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

January 27, 1977.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA RALEIGH DIVISION

CIVIL ACTION NO. 75-0328-CIV.-5

UNITED STATES OF AMERICA, Plaintiff

v.

STATE OF NORTH CAROLINA; E. W. JONES, COMMANDER, NORTH CAROLINA STATE HIGHWAY PATROL; JAKE ALEXANDER, SECRETARY NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY, Defendants

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MEMORANDUM AND RECOMMENDATION ON DEFENDANTS MOTION FOR JUDGMENT ON THE PLEADINGS.

This action against the North Carolina State Highway Patrol was instituted October 23, 1975 against the North Carolina State Highway Patrol by the Attorney General on behalf of the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972). Jurisdiction of the court is asserted under 42 U.S.C. § 2000e-6(b), and 28 U.S.C. § 1345. The complaint alleges that the defendants have pursued and continue to pursue practices which discriminate against blacks and women with respect to employment opportunities in the North Carolina State Highway Patrol.

The Attorney General was authorized by the Civil Rights Act of 1964 to bring Title VII pattern and practice

suits against private employers in 42 U.S.C. § 2000e-6(b). The Equal Employment Opportunity Act of 1972 extended the jurisdiction of the Act to cover public employers like these defendants. 42 U.S.C. § 2000e(a). The Act also transferred the functions of the Attorney General under that section 2000e-6 to the Employment Opportunity Commission, such transfer to become effective March 24, 1974, prior to the commencement of this action. 42 U.S.C. § 2000e-6(c).

The defendants have filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, contending that Section 2000e-6(c) of the Equal Employment Opportunity Act of 1972 divested the Attorney General of all authority to bring pattern and practice suits after March 24, 1974, and gave the Equal Employment Opportunity Commission exclusive authority to bring such suits. The defendants also rely upon Rule 12(b)(6); they have filed an affidavit that the EEOC has not been involved in any way in these proceedings, and asked that the motion also be considered as a motion for summary judgment.

The only two opinions cited by either party which are directly in point, those dealing with pattern and practice suits brought by the Attorney General since March 24, 1974, are *U.S. v. Pima County College*, 409 F. Supp. 1061, 12 FEP cases 801 (D.C. Arizona March 22, 1976) and *U.S. v. Fresno Unified School District*, 412 F. Supp. 392, 13 FEP cases 684 (E.D. Cal. April 27, 1976), both of which were pattern and practice suits brought by the Attorney General against governmental units after March 24, 1974. In each case the court granted the defendant's motion for dismissal based on lack of jurisdiction, holding that since March 24, 1974 the sole federal agency authorized to bring a pattern and practice suit against an

employer, either private or public, is the Equal Employment Opportunity Commission.

The plaintiff argues that the 1972 amendments transferring jurisdiction are ambiguous, and that the legislative history shows that it was the intention of Congress that the Attorney General's former authority over pattern and practice suits should survive the 1972 amendments. The language of the amendments seems clear and unambiguous to me, and the court in *U.S. v. Fresno* dealt with the argument and rejected it. The only case cited by the plaintiff in support of jurisdiction is *EEOC v. United Air Lines*, United States District Court, Northern District of Illinois, June 26, 1975, 2 EPD para. 110271, pp. 5135-5136, but in that case the Attorney General brought suit in 1973 prior to the effective date of transfer of jurisdiction to the EEOC. That agency was substituted as plaintiff after the transfer date pursuant to the amendments, and the issue was based on whether the lack of EEOC conciliation efforts prior to institution of the suit was fatal to jurisdiction. The court held that jurisdiction was not lost because the Attorney General had the authority during that period and was not required to pursue the investigative and conciliation remedies which are required of the EEOC. That case is not in conflict with the two cases referred to above.

For the foregoing reasons, it is my opinion that the court does not have jurisdiction of the subject matter and that the defendants' motion to dismiss should be allowed.

This 30th day of December, 1976.

/s/ Logan D. Howell

Logan D. Howell
United States Magistrate